

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST  
LITIGATION

No. M 07-1827 SI  
MDL No. 1827

This Order Relates To:

No. C 11-3856 SI

SCHULTZE AGENCY SERVICES, LLC,

**ORDER GRANTING DEFENDANTS'  
JOINT MOTION TO DISMISS**

Plaintiff,

v.

AU OPTRONICS CORPORATION, *et al.*,

Defendants.

Defendants have filed a joint motion to dismiss the complaint of Schultze Agency Services, LLC, a bank bringing claims that originally belonged to Tweeter Home Entertainment Group (“Tweeter”). The thrust of defendants’ motion is that Tweeter’s claim under the Massachusetts Consumer Protection Act is untimely because it was filed more than four years after it accrued. *See* Mass. Gen. L. Ch. 260 § 5A (“Actions arising on account of violations of any law intended for the protection of consumers, including . . . chapter ninety-three A . . . shall be commenced only within four years next after the cause of action accrues.”). It is undisputed that Tweeter filed its complaint more than four years after its causes of action began accruing; the sole dispute on this issue concerns Tweeter’s entitlement to tolling.

In its opposition brief, Tweeter complains, as its counsel has in previous filings, that defendants will raise a number of new arguments on reply. *See, e.g.,* Opp’n at 3 (“Tweeter expects that Defendants will raise these arguments for the first time in their reply . . . . These arguments . . . have been forfeited

1 . . . .”); *see also* Plaintiff Office Depot, Inc.’s Opposition to Defendants’ Administrative Motion for  
2 Clarification, Master Docket No. 4643, at 2 (January 24, 2012) (“In their reply brief, Defendants argued  
3 for the first time in this LCD MDL that the early class complaints did not toll the statute of limitations  
4 if the named plaintiffs in those complaints were residents of states other than Florida and California,  
5 because those plaintiffs lacked standing.”). While there is some merit to Tweeter’s concern – it goes  
6 without saying that a party may not raise arguments for the first time in its reply brief – the problem is  
7 entirely of Tweeter’s own making. Tweeter’s FAC does not identify the specific basis for its claimed  
8 entitlement to tolling. Instead, the specifics are set out, for the first time, in its opposition brief. Thus,  
9 defendants’ first opportunity to address Tweeter’s arguments comes with their reply.

10 This process is neither efficient nor productive. Defendants cannot be expected to disprove  
11 every conceivable basis on which Tweeter might be entitled to tolling. Proceeding in this fashion has  
12 led to piecemeal presentation of the issues and a general lack of finality. One need look no further than  
13 Tweeter’s opposition brief in this case to reach this conclusion; the brief takes issues with this Court’s  
14 previous decisions based upon arguments that were not developed when they were originally presented  
15 to the Court. *See, e.g.*, Opp’n at 8 (“[T]he Court’s decisions are: (a) inconsistent with *American Pipe*;  
16 (b) inconsistent with this Court’s prior decisions in the LCD MDL, which have repeatedly held that the  
17 place of purchase—not a plaintiff’s state of residency—determines whether a plaintiff can sue under  
18 a particular state’s laws; (c) inconsistent with decisions reached by several other courts, which  
19 demonstrates that Tweeter reasonably relied on early class action complaints filed by non-Massachusetts  
20 residents as grounds for tolling; and (d) not supported by the authorities Defendants rely upon.”); *see*  
21 *also id.* at 8 n.3 (“Notably, none of the plaintiffs in these cases had the opportunity to brief this issue,  
22 because the Defendants raised this issue for the first time in their reply briefs—as they will improperly  
23 do again here.”).

24 The solution to this problem is not, as Tweeter argues, to disregard defendants’ reply. Rather,  
25 plaintiffs in this MDL must plead with specificity the bases for their entitlement to tolling. *Cf. Hinton*  
26 *v. Pacific Enters.*, 5 F.3d 391, 395 (9th Cir. 1993) (“The burden of alleging facts which would give rise  
27 to tolling falls upon the plaintiff. . . . That burden does not arise only after a motion to dismiss; rather,  
28 the plaintiff ‘must plead with particularity the circumstances surrounding the concealment and state facts

**IT IS SO ORDERED.**

  
SUSAN ILLSTON  
United States District Judge

<sup>1</sup>Because it dismisses Tweeter's complaint on this ground, the Court DENIES the parties' stipulation to continue the hearing on this matter to April 27, 2012.